



October 20, 1999

Ms. Martha Williams
General Counsel
Port of Houston Authority
P.O. Box 2562
Houston, Texas 77252-2562

OR99-2968

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128239.

The Port of Houston Authority (the “authority”) received a request for the following information:

The complete Booz-Allen & Hamilton study on the Bayport project.

Any other consultant studies or reports o the Bayport project, not including the eight volume Master Plan.

Any internal or external analyses of air pollution or air quality issues associated with the Bayport project.

Any correspondence between the Port and HGAC, TNRCC, EPA, the City of Houston, or any other agency or body concerning air pollution, conformity analysis or the Transportation Improvement plan related to the Bayport project.

Any internal memos, e-mail or other communications concerning air pollution, conformity analysis or the Transportation Improvement plan related to the Bayport project.

Any contracts with Public Strategies and Hill & Knowlton, as well as any correspondence between the Port and those firms, dating from 1/1/96 to the present.

A list of those invited to participate on the Citizens Advisory Panel chaired by John Hall.

Mr. Hall's contract, as well as any correspondence between the Port and Mr. Hall from 1/1/99 to the present.

Any contracts with Dave Walden, as well as any correspondence between the Port and Mr. Walden dating from 1/1/98 to the present.

A complete record of payouts, including recipient and amount, from the promotion and development fund used for advertising and promoting the Port, dating from 1/1/96 to the present.

Actual budgets for fiscal years 1997-'98 and 1998-'99, in as much detail as possible, on computer diskette.

You indicate that most of the requested information will be released to this requestor, however, you seek to withhold a portion of the subject information, contending that it is excepted from public disclosure by sections 552.104, 552.107 and 552.111 of the Government Code. You have submitted responsive information to this office for review. As you have not indicated that the information submitted is a representative sample of the responsive information, we assume that responsive information not submitted has been released to this requestor. Also, you have indicated that a portion of the requested information has previously been released to the public. The Public Information Act prohibits the selective disclosure of information. Gov't Code § 552.007; Open Records Decision No. 490 (1988). Therefore any portion of the subject information that has previously been released must be released to this requestor, irrespective of any finding herein that the information is excepted from public disclosure. We have reviewed the submitted documents and considered the exceptions you claim.

Section 552.111 of the Government Code excepts from required public disclosure interagency and intra-agency memoranda and letters to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). Although section 552.111 does not protect facts and written observation of facts and

events that are severable from advice, opinions, and recommendation, *see* Open Records Decision No. 615 at 5 (1993), if the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

You wish to withhold handwritten comments placed in certain documents to indicate the advice and opinion of staff, presented for policy decision making purposes. From our review of these comments we conclude that they may be withheld under section 552.111 of the Government Code.

We note that some of the information you seek to withhold was submitted to the commission from outside parties. In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972). The ultimate test to which these factors are directed is whether the governmental entity intended the advice, opinion, or recommendation to play a role in its decision-making process. *See* Open Records Decision No. 464 (1987). Apparently, the authority commissioned outside consultants, specifically requesting their opinions in regard to policy matters. From our review of these reports we conclude that they may be withheld in their entirety pursuant to section 552.111 of the Government Code.

You indicate that a portion of the subject information consists of drafts of documents which the authority intends to release in final form. The draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld under section 552.111 of the Government Code. *see* Open Records Decision No. 559 (1990). These drafts may therefore be withheld under section 552.111. However, the existence of such drafts is not protected, therefore transmittal letters, to the degree that they are responsive to this request, must be released.

The submitted information includes communications between the authority and attorneys performing legal services for the authority. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the

attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* As the relevant materials consist entirely of the authority's confidential communications to counsel, and the opinion and advice of counsel to the authority, we conclude that this information may be withheld under section 552.107 of the Government Code.

Since section 552.104 does not except from public disclosure any of the subject information that is not excepted under 552.107 or 552.111, we do not address the application of that provision of the Public Information Act. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns", written in a cursive style.

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 128239

Encl. Submitted documents

cc: Mr. Bob Burtman
Houston Press
1621 Milam, Suite 100
Houston, Texas 77002
(w/o enclosures)